APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD — PETITIONERS

vs.

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

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RELEVANT DOCKET ENTRIES

4/30/73: PETITION FOR REMOVAL, Copy of proceedings in Pike Circuit Court, Removal Bond, Notice of Removal, and ANSWER of Defendants filed.

2/6/74: ORDER: entered 2/5/74, requiring Defendants to show cause within ten days why the ends of justice do not require that this matter be remanded to the Pike Circuit Court.

2/13/74: OBJECTIONS to remanding with Memorandum is support filed by Defendants.

2/13/74: NOTICE OF DEFENDANTS to take Depositions of Plaintiffs on 2/21/74.

3/25/74: MEMORANDUM OPINION AND ORDER; signed and filed 3/22/74: remanded to Pike Circuit Court.

CLOSED.

4/12/74: Depositions of Jay Lee Little and Lona Little taken for purpose of discovery filed.

4/11/74: PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION FILED By Petitioners.

4/19/74: RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION FILED By Respondent.

4/25/74: MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM OF AUTHORITIES and MEMORANDUM OF SUPPLEMENTAL AUTHORITIES filed in support of Petition for Writ of Mandamus and/or for Writ of Prohibition.

6/4/74: ORDER: signed and filed 6/4/74, denying Petition for Writ of Mandamus and/or Petition for Writ of Prohibition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

JAY LEE LITTLE and
LONA LITTLE PLAINTIFFS

VS. **PETITION FOR REMOVAL** NO.____

THERNTRON PRODUCTS, INC.
and LARRY DEAN NEWHARD DEFENDANTS

* * * * * * *

The Petition for Removal of the defendants, Therntron Products, Inc. and Larry Dean Newhard, and each of them, states as follows:

1. On the 9th day of April, 1973, an action was commenced by the above named plaintiffs against the above named defendants styled "Jay Lee Little and Lona Little, Plaintiffs vs. Therntron Products, Inc. and Larry Dean Newhard, Defendants", in the Pike Circuit Court, being Civil Action No. 14666, by service upon the defendants and each of them, such service being by substituted service on the Secretary of State of the Commonwealth of Kentucky, at or about the hour of 9:00 a.m., on April 10, 1973, and the Secretary of State notified these defendants and each of them, by mail, by letter dated April 10, 1973, mailing to these defendants and each of them the

summons and complaint, pursuant to and as provided for in Section 188.030, Kentucky Revised Statutes. Attached hereto and for the purposes of identification are said complaint, said summons, and letter from the Secretary of State, marked Exhibits "A", "B", and "C" in that order.

2. No further proceedings have been had in said action in the Pike Circuit Court by these defendants, or either of them, and/or by the plaintiffs other than the filing of said action and the service of summons thereon.

3. This Petition for Removal is being filed within thirty days from the date of service of summons upon these defendants, which service of summons on these defendants, by and through the Secretary of State, was had on April 10, 1973.

4. The above described action as shown by Exhibit "A" hereto attached, is a civil action of which this court has original jurisdiction under the provisions of Title 28 U. S. Code Section 1331, and is one which may be removed to this Court by the petitioners, these defendants, Therntron Products, Inc. and Larry Dean Newhard, pursuant to the provisions of Title 28 U. S. Code Section 1441, in that:

(a) The amount in controversy, exclusive of interest and costs, on the claim of each of the plaintiffs herein, separately, is in excess of Ten Thousand ($10,000.00) Dollars, each.

(b) The plaintiffs, Jay Lee Little and Lona Little, at all times hereinbefore mentioned, and now, are each citizens and residents of Pike County, Kentucky, within the Eastern District of the United States District Court.

(c) The defendant, Therntron Products, Inc. at the time of filing of the complaint herein, and now, is a foreign corporation, incorporated under the laws of the State of Indiana, is not a citizen and resident of the State of Kentucky, is a citizen and resident of the State of Indiana, is not a citizen and resident of any other state than Indiana, and is engaged in the business of manufacturing and selling at wholesale, and delivering the same by truck, the products of housing and building insulating materials; that said defendant's principal office and place of business is at Fort Wayne, Indiana, and that it has no other principal office and place of business in any other state than Indiana, and that it has no office or place of business, principal or otherwise, in the State of Kentucky; and is not incorporated under the laws of or in the State of Kentucky, and has no officers or directors residing in the State of Kentucky, and has no principal office and place of business in Kentucky; and that it is incorporated in only the State of Indiana, and no other state of the United States, and has no other principal office or place of business in any other state than Fort Wayne, Indiana, and that it has no officers or directors residing in the State of

Kentucky, and that it owns no property, real or personal, in the State of Kentucky.

(d) Petitioners state that the defendant, Larry Dean Newhard, was at all times hereinbefore mentioned, and is now, a citizen and resident of Bluffton, Indiana, residing at 326 North Marion Street, in said city, and that he is not a citizen or resident of any other state than Indiana; and that he is not a citizen or resident of the State of Kentucky.

5. The defendants, Therntron Products, Inc. and Larry Dean Newhard, and each of them, the petitioners herein, have filed herewith a Bond with good and sufficient surety, conditioned as provided by Title 28, U. S. Code, Section 1446 (d), that it will pay all costs and disbursements incurred by reason of the removal proceedings herein brought, should it be determined that this action is not removable, or was improperly removed.

WHEREFORE, the petitioners, the defendants herein, Therntron Products, Inc. and Larry Dean Newhard, and each of them, pray that the above action now pending against them in the Pike Circuit

Court, Pikeville, Kentucky, be removed therefrom to this Court.

LANDRUM, PATTERSON & DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ Frank G. Dickey, Jr.
Attorneys For Defendants

(Jurat Omitted in Printing)

* * * * * * *

EXHIBIT "A"

FILED: April 3, 1973

PIKE CIRCUIT COURT
DIVISION#_____

ACTION #14666

JAY LEE LITTLE and
LONA LITTLE — PLAINTIFFS

VS: — COMPLAINT

THERNTRON PRODUCTS, INC., and
LARRY DEAN NEWHARD — DEFENDANTS

* * *

Come the plaintiffs, Jay Lee Little and Lona Little, and for their cause of action against the defendants, state:

1. That the plaintiffs, at all times hereinafter mentioned, were and still are, citizens and residents of Pike County, Kentucky.

2. That at all times hereinafter mentioned, the defendant, Larry Dean Newhard, was an employee of the defendant, Therntron Products, Inc., and a citizen and resident of Indiana, residing at 326 North Marion, Bluffton, Indiana, that the address of

Therntron Products, Inc. is P. O. Box 9146, Fort Wayne, Indiana.

3. That the defendant, Therntron Products, Inc., is a corporation created and existing under the laws of one of the States of the United States of America, as to the exact one plaintiff has no information; that at all times hereinafter mentioned, said defendant was doing business in the State of Kentucky, and had no designated process agent in this State; that the defendants, Therntron Products, Inc., and Larry Dean Newhard, by accepting the privileges extended by the laws of the Commonwealth of Kentucky to operate motor vehicle within the State have designated as their personal representative for service of process, the Secretary of State of the Commonwealth of Kentucky, in accordance with KRS 188.020.

4. That on or about November 17, 1972, at or near Wales, Pike County, Kentucky, the plaintiff, Jay Lee Little, was operating his motor vehicle, 1966 Chevrolet, in a careful and prudent manner, upon a public highway, Kentucky 122, two miles west of Wales, Kentucky, in a westerly direction; that while the plaintiff, Jay Lee Little, was so operating said motor vehicle at said time and place, the plaintiff, Lona Little, was a passenger in said motor vehicle aforementioned.

5. That at said time and place, the defendant, Larry Dean Newhard, was operating a motor vehicle,

1969 Mack Truck, belonging to the defendant, Therntron Products, Inc., as an employee of the defendant, Therntron Products, Inc., in an easterly direction, in a negligent and careless manner, upon said public highway, Kentucky 122, and as a result thereof caused said motor vehicle to collide, run into, upon and against the motor vehicle then and there being operated by the plaintiff, Jay Lee Little.

6. That at all times hereinabove mentioned, the defendant, Larry Dean Newhard, was operating said truck in the course and scope of his employment with the defendant, Therntron Products, Inc.

7. That as a result of the accident which occurred in the manner aforesaid, the plaintiff, Jay Lee Little, received divers cuts, bruises, broken bones and injuries, and suffered both great physical and mental pain and permanent injuries, and as a result thereof the plaintiff had to expend and will continue to expend large sums of money for doctor, medical and nursing care, and in addition, said plaintiff has lost wages, all to his damage in the amount of $100,000.00.

8. That as a result of the accident which occurred in the manner aforesaid, the plaintiff's, Jay Lee Little's motor vehicle aforementioned, was damaged so that the difference in the fair cash market value immediately before and after said accident, was and is the sum of $1000.00.

9. That as a result of the accident which occurred in the manner aforesaid, the plaintiff, Lona Little, received divers cuts, bruises, broken bones and suffered both great physical and mental pain and permanent injuries, and as a result thereof the plaintiff had to expend, and will continue to expend, large sums of money for doctor, medical and nursing care, all to her damage in the amount of $100,000.00.

WHEREFORE, plaintiffs, Jay Lee Little and Lona Little, demand judgment against the defendants, jointly and severally as follows:

1. That the plaintiff, Jay Lee Little, recover of the defendants, jointly and severally, the sum of $101,000.00.

2. That the plaintiff, Lona Little, recover of the defendants, jointly and severally, the sum of $100,000.00.

3. That plaintiffs recover of the defendants their costs herein expended, and any and all other relief to which it may appear that each be entitled.

4. Plaintiffs demand a trial by jury.

KELSEY E. FRIEND
LAW FIRM
ATTORNEYS FOR PLAINTIFF
PIKEVILLE, KENTUCKY

BY: s/ R. Roland Case
Of Counsel

* * * * * * * *

(TITLE OMITTED IN PRINTING)

ANSWER

The defendants and each of them, for answer herein state as follows:

FIRST DEFENSE

These defendants and each of them specifically deny each and every allegation contained in the complaint except paragraphs 1 and 2 thereof, and paragraph 6 thereof, each of which is specifically admitted.

SECOND DEFENSE

These defendants and each of them state that upon the occasion complained of the plaintiffs and each of them were guilty of negligence which contributed to cause and bring about the injuries and damages sustained by them and each of them.

THIRD DEFENSE

These defendants and each of them state that upon the occasion complained of the accident of which the plaintiffs complain was caused and brought about by the sole negligence of the plaintiff, Jay Lee Little, and these defendants and each of them rely upon the same as a bar to the cause of action of each of the plaintiffs herein.

WHEREFORE, the defendants and each of them demand that the complaint herein be dismissed, for their costs, and for trial by jury herein.

LANDRUM, PATTERSON &
DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ Frank G. Dickey, Jr.
Attorneys for Defendants

(Certificate Omitted in Printing)

* * * * * * *

FILED: February 5, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS: **ORDER**

THERNTON PRODUCTS, INC., and
LARRY DEAN NEWHARD, DEFENDANTS.

It appearing to the Court that the above styled action was removed from the Pike Circuit Court, Pike County, Kentucky on April 30, 1973 pursuant to the provisions of 28 U.S.C. §1446, and the Court having reviewed the entire civil docket and finding that there is no available time in which to try the above styled action in the foreseeable future and being advised that an adjudication of the merits contained herein would be expedited in the Pike Circuit Court, Pike County, Kentucky, and being advised,

IT IS ORDERED that the defendant herein show cause within ten (10) days from this date as to why the ends of justice do not require this matter be

remanded to the Pike Circuit Court, Pike County, Kentucky.

IT IS SO ORDERED this 5 day of February, 1974.

s/ H. David Hermansdorfer
H. David Hermansdorfer, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By: s/ Mary F. Blalock, D. C.

* * * * * * * *

(Title Omitted in Printing)

OBJECTIONS TO REMANDING AND MEMORANDUM

The defendants, and each of them, by counsel, in response to order of this Court dated February 5, 1974, object to the remanding of this case to the Pike Circuit Court upon the following grounds and for the following reasons:

1. This is an action between citizens of different states, as shown by the petition for removal herein, and this Court has jurisdiction under Article III of the Constitution of the United States, and by reason of 28 USC 1332, 28 USC 1441(a), and that a remanding of this case to the Pike Circuit Court would deprive these defendants and each of them of their constitutional rights under the United States Consitution, and of their statutory rights granted to them by acts of Congress above mentioned.

2. These defendants would not have removed this case to the United States District Court if these defendants thought or had reasons to believe that they could receive a fair and impartial trial in the Pike Circuit Court, and these defendants continue to so believe their interest can best be served by insisting upon the jurisdiction of the United States District Court for the Eastern District of Kentucky.

3. That no legal grounds exist upon which this Court can exercise discretion to remand the case to

the Pike Circuit Court, and in fact, this Court has no discretion to remand since there is no appearance that the case was removed in the first place improvidently and without jurisdiction. 28 USC Section 1447(c).

The defendants state, that in support of the foregoing objections to remanding that Article III, Section 2, of the Constitution of the United States provides that the judicial power of the United States shall extend, *inter alia* to controversies "between citizens of different states. . ." (Moore's Federal Practice Volume I, Section 0.71 [i], at page 701.10).

The Constitution itself has established national tribunals for decisions of controversies between citizens of different states. *Bank of the United States* v. *Deveaux*, (1809) 5 Cranch 61, 87, 3 L. Ed. 38. Moore's Federal Practice Volume 1, Section 0.71 [e.1], at page 701.22.

Citizens of different states are also citizens of the United States, and they ought to be able to litigate their controversies in a tribunal of the sovereign to which they both belong (Hamilton, The Federalist No. 80, Colonial Press 1901, page 440-441).

As stated by Professor Moore, Moore's Federal Practice, Volume 1, Section 0.71 [3.-2], at page 701.34:

> If delay in the federal courts has become excessive as it no doubt has in many places, remedies should be sought which strike at the cause of the delay and which do more than

> merely relocate the problem in the state courts. The whittling away or surrender of diversity jurisdiction, or of any other part of the federal jurisdiction which serves a legitimate function under the constitution, only weaken the federal system under which we have long prospered and, with, fair success, have done justice between disputants."

As to the point that this Court lacks discretion to remand this case, in the case of *Vann* v. *Jackson*, 165 F. Supp, 377 (E.D.N.C. 1959), District Judge Stanley stated:

> "It is concluded that where Congress has provided both a state and a federal forum and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court."

Also see the decision of District Judge Larkins, in *Davis* v. *Joyner*, (E.D.N.C., 1964) 240 F. Supp. 689.

Also see the well reasoned opinion of our own Judge H. Church Ford in the case of *Larkin* v. *Roseberry* (E.D.Ky., 1944) 54 F. Supp. 373. In that case an action was brought in the Fayette Circuit Court, reviewing a decision concerning tobacco marketing quotas. The proceeding was removed to the United States District Court at Lexington upon the ground that it was a suit of a civil nature arising under a law of the United States. The plaintiff moved

to remand to the state court. In denying the motion to remand Judge Ford ably reasoned that a dissatisfied farmer may select the court in which to institute the proceeding (whether state court or federal court) but that this right of the plaintiff to select the court of first instance is not different from that which prevails in all cases where jurisdiction of the federal and state courts is concurrent. He further held that the right of a plaintiff to choose, between courts of concurrent jurisdiction, the form in which to institute his action, should not be held to negative the right of removal for otherwise the removal statute would not be operative in any case.

In the case at bar the plaintiff chose to sue the non-resident defendants in the state court. The non-resident defendants choose to remove it to federal court. To remand merely because of a crowded docket disposes of the defendants' constitutional and statutory right to removal in the first place. In determining whether or not this court can remove because this court is of the opinion that the "ends of justice" require such, this court should examine whether it has the discretion to do so in the first place. If the discretion does not exist, then the right to remand does not exist.

Respectfully submitted,

LANDRUM, PATTERSON &
DICKEY
201 Security Trust Building
Lexington, Kentucky

BY: s/ FGDJ
Attorneys for Defendants

(Certificate Omitted in Printing)

* * * * * * * *

FILED: March 22, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1723

JAY LEE LITTLE and
LONA LITTLE, PLAINTIFFS,

VS: **MEMORANDUM OPINION AND ORDER**

THERNTRON PRODUCTS, INC.
and LARRY DEAN NEWHARD, DEFENDANTS.

See Petition For Writ of Certiorari, Appendix, p. 3a.

* * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
(erroneously sued as Therntron Products, Inc.)
AND LARRY DEAN NEWHARD PETITIONERS

VS.

HON. H. DAVID HERMANSDORFER,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT
OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF MANDAMUS
AND/OR PETITION FOR
WRIT OF PROHIBITION NO._____

TO THE HON. UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT:

* * * * * * * *

Petitioners, Thermtron Products, Inc., (erroneously sued as Therntron Products, Inc.), and Larry Dean Newhard, respectfully state that the jurisdiction of the United States District Court For The Eastern District of Kentucky, At Pikeville, has been erroneously, wrongfully, and without any authority, whatsoever, taken from these Petitioners, contrary to

and in denial of the Statutory, Constitutional and Civil Rights of these Petitioners. Petitioners further state that Civil Action No. 14666, filed in the Pike Circuit Court, Pike County, Kentucky, styled Jay Lee Little and Lona Little, Plaintiffs, vs. Therntron Products, Inc. and Larry Dean Newhard, Defendants, was properly removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, subsequent to which said Court took and exercised jurisdiction over the subject matter and the parties to said action, on or about April 30, 1973, the properly removed case was assigned Civil Action No. 1723, in the United States District Court for the Eastern District of Kentucky, at Pikeville. Respondent herein, on March 22, 1974, entered an Order remanding said action to the Pike Circuit Court, even after the Respondent admitted and conceded that the action had been properly removed and that the United States District Court had jurisdiction over the subject matter and the parties all of which appears more fully as hereinafter set forth:

STATEMENT OF FACTS

1. On April 9, 1973 an action was commenced by Jay Lee Little and Lona Little, Plaintiffs, against these Petitioners in the Pike Circuit Court, Pike County, Kentucky being Civil Action No. 14666, a Court of competent jurisdiction, by issuance of summons, which was served upon these Petitioners by substituted service upon the Secretary of State of

the Commonwealth of Kentucky, on April 10, 1973, a copy of which Complaint, summons, and notification from the Secretary of State are attached hereto and made a part hereof and designated for the purposes of reference thereto as Exhibits "A", "B", and "C", respectively.

2. That under Certificate of Service dated April 26, 1973, Notice of Removal was given to the plaintiffs and counsel for the plaintiffs, Jay Lee Little and Lona Little, and to the Pike Circuit Court Clerk, and on or about April 26, 1973 these Petitioners filed a Petition and Bond for Removal in the United States District Court for the Eastern District of Kentucky, at Pikeville, a copy of which Petition and Bond for Removal are attached hereto and made a part hereof and designated for the purposes of reference as Exhibits "D", "E", respectively.

3. That under Certificate of Service dated April 26, 1973 these Petitioners filed an Answer to the Complaint of the plaintiffs, Jay Lee Little and Lona Little, in Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville, which pleading and answer is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "F".

4. That said removal of the above action and said filing of the responsive pleading or answer was done by counsel for these Petitioners at their specific request and in accord with the Statutory,

Constitutional, and Civil Rights and desires of these Petitioners.

5. That the Respondent has admitted and conceded that the Petitioners properly removed the above action from the Pike Circuit Court to the United States District Court for the Eastern District of Kentucky, at Pikeville, being Civil Action No. 1723 and styled Jay Lee Little and Lona Little, plaintiffs, against Therntron Products, Inc. and Larry Dean Newhard, Defendant, which removal has been noted by the Respondent herein as having been properly effected on April 30, 1973.

6. That the plaintiffs, Jay Lee Little and Lona Little, have never objected nor moved the Respondent for any Orders with respect to the proper removal of this action or with regard to the jurisdiction exercised by the Respondent herein and said Plaintiffs have remained silent throughout all proceedings.

7. That the Respondent recognized, assumed, and exercised jurisdiction, as required, over the subject matter and the parties with respect to Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville.

8. That under Certificate of Service dated January 28, 1974, these Petitioners served notice to take the depositions of the plaintiffs, Jay Lee Little and Lona Little, and a copy of which is attached

hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "G".

9. That the Respondent herein entered an Order in Civil Action No. 1723 in the United States District Court for the Eastern District of Kentucky, at Pikeville, on February 5, 1974, wherein the Respondent acknowledged, admitted and respected the fact that these Petitioners have properly removed said action pursuant to the provisions of 28 U. S. C. §1446 and wherein the Respondent arbitrarily and without authority required these Petitioners to "show cause" within ten days as to why said action should not be remanded to the Pike Circuit Court, which Order was and is void, and which Order is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "H".

10. That these Petitioners, under Certificate of Service dated February 11, 1974, timely filed Objections and Response to the Order (Exhibit "H") of the Respondent, a copy of which is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "I".

11. That the Petitioners took the depositions of the plaintiffs, Jay Lee Little and Lona Little, on February 21, 1974, which depositions were not transcribed and certified by the Court Reporter until March 27, 1974.

12. That on March 22, 1974 the Respondent herein entered a Memorandum, Opinion and Order

remanding Civil Action No. 1723 in the United States District Court For The Eastern District of Kentucky, at Pikeville, to the Pike Circuit Court, wherein the Respondent conceded the Right of these Petitioners to remove said action from the Pike Circuit Court, where the provisions of 28 U. S. C. §144l, et. seq. were properly followed, a copy of which Memorandum, Opinion and Order is attached hereto and made a part hereof and designated for the purpose of reference thereto as Exhibit "J".

13. These Petitioners believe, upon information only, that the Respondent herein has entered similar Orders of Remand in approximately 28 other actions, which actions either were removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, in 1973, or which actions constitute all cases removed to said Court during the year 1973.

14. That this Petition for Writ of Mandamus and/or Writ of Prohibition directs itself to an apparent case of first impression, with regard to all pertinent issues.

15. That these Petitioners are entitled to all extraordinary relief pursuant to 28 U. S. C. §1651 and Rule 21 of the Rules of Appellate procedure, and have no apparent remedy by direct appeal.

STATEMENT OF ISSUES

1. Whether the action of the Respondent, in remanding Civil Action No. 1723 in the United States District Court, for the Eastern District of Kentucky, at Pikeville, to the Pike Circuit Court, Pike County, Kentucky, ignored and violated the mandatory and unambiguous provisions of 28 U. S. C. 1441, et. seq. which action was so arbitrary, unauthorized, and clearly erroneous so as to deprive these Petitioners of their statutory rights pursuant to 28 U. S. C. §1332 and 28 U. S. C. §1441, et. seq., their Constitutional Rights provided by Article III, §2 of the Constitution of the United States and guaranteed these Petitioners by the Fourteenth Amendment to the Constitution of the United States, and their Civil Rights.

2. Whether the Respondent has any authority whatsoever or any discretion to divest the United States District Court for the Eastern District of Kentucky, at Pikeville, of jurisdiction over the subject matter and parties in Civil Action No. 1723, docketed therein, where it is the mandatory duty of the Respondent herein to retain and exercise jurisdiction, where the Pike Circuit Court was a Court of competent jurisdiction and where the Pike Circuit Court was a Court of competent jurisdiction and where the above action, as conceded by the Respondent, was admittedly removed properly pursuant to the requirements of 28 U. S. C. 1441, et. seq., which jurisdiction has never been challenged, and where there was no improvident removal by these Petitioners.

3. Whether the right to remove the above action to the United States District Court for the Eastern District of Kentucky, at Pikeville, was the exclusive right of these Petitioners, pursuant to the aforementioned Statutory and Constitutional Provisions, which right may not be substantively and procedurally denied these Petitioners by the unauthorized and void act of the Respondent herein, and which right may not be "balanced" weighed or otherwise by the Respondent against other discretionary considerations.

STATEMENT OF GROUNDS UPON WHICH WRIT SHOULD BE ISSUED

The reasons the Writ of Mandamus and/or Writ of Prohibition should be granted and issued, based upon the aforementioned facts, are plain and obvious.

Article III, §2 of the Constitution of the United States provides that the Judicial power of the United States shall extend to controversies "between citizens of different states." The aforementioned action is one between citizens of different states, which was properly removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, pursuant to 28 U. S. C. 1441, et. seq.

As stated in Moore's Federal Practice, Volume 1, §0171 [3.-2] at page 701.29:

> "Despite frequent agitation to eliminate or curtail jurisdiction especially in light of the ever increas-

ing work load of the Federal Courts, diversity continues to provide a foundation for a substantial part of the cases in the lower Federal Courts. From the foundation of the Republic and during the ensuing years, the lower Federal Courts have been a cohesive force, during both quiet and tumultuous times, holding this Nation together under the binding principles of Justice under law. ***local Courts alone cannot resolve the conflicts and lead the way.***

***the Constitution envisions a working partnership between the State and Federal Courts under which each forum may enforce the law of the other sovereign when it is deemed appropriate *If delay in the Federal Courts has become excessive, as it no doubt has in many places, remedies should be sought which strike at the cause of the delay and which do more than merely relocate the problem in the State Courts. The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the Federal System under which we have long prospered and, with fair success, have done justice between disputants.*" (emphasis added).

Respondent has ignored and violated the mandatory and unambiguous provisions of 28 U. S. C. 1441. The Respondent has no authority, whatsoever, nor any discretion to divest the United States District Court for the Eastern District of Kentucky, at Pikeville, of jurisdiction over the

subject matter and parties, where the Petitioners have an exclusive right to remove the aforementioned action, and where said action was properly removed.

Certainly, the provisions of 28 U. S. C. 1441, et. seq. are clear and unambiguous. The Petitioners, as admitted and conceded by the Respondent herein, properly followed the procedures set forth therein. Furthermore, the Respondent exercised jurisdiction from April 30, 1973 and still has jurisdiction over the subject matter and parties.

It is stated in *Mach-Tronics, Incorporated* vs. *Zirpoli,* (Ninth Circuit) 316 F. 2d 820 (1963), at page 824, as follows:

> "It has long been recognized that when a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. (Citations omitted). It has also been considered to be the rule that when a Federal Court is presented with a case of which it has cognizance it may not turn the matter over for adjudication to the State Court. . . ."

It is therefore, submitted that it is the mandatory duty of the Respondent herein to retain and exercise jurisdiction, in the aforementioned action.

It was the exclusive right of these Petitioners to remove the action to the United States District Court for the Eastern District of Kentucky, at Pikeville.

There is no discretionary power whatsoever, to remand this case to the State Court. Therefore, the Writ of Mandamus and/or Writ of Prohibition sought herein should be granted.

In *Travelers' Protective Association* vs. *Smith,* (Fouth Circuit) 71 F. 2d 511 (1934), an action was instituted by Citizens of North Carolina, in a Court of that State, against a Citizen of the State of Missouri. The action was duly removed to Federal Court on the ground of diversity of Citizenship. In the Travelers', case, the propriety of the removal was never challenged, which is the identical situation in the within action. However, after the Defendant had answered, the plaintiffs filed a written waiver of their right to recover in the amount in excess of $3,000.00 and remitted to the defendant any excess. The Plaintiffs then moved that the cause be remanded to the State Court upon the ground that such remittitur had been filed. The Judge entered an Order remanding the case on that ground, *without finding that it had been improperly removed into the Federal Court and without anything appearing of record to show that the removal was in any wise improper.* (emphasis added). The Defendant appealed from the Order remanding the case and asked leave to file a Petition for a Writ of Mandamus. The Court in the *Travelers,* case, stated, at page 512, that "[T]he action . . . was properly removed into the Federal Court and the jurisdiction of that Court attached." The

Court further stated that no appeal lies from the Order remanding the case to the State Court, for the reason that it is not a final judgment, however, in the absence of Statute, Mandamus is an appropriate remedy to require the trial Court to hear and decide a case which it has improperly remanded. The Court further stated, at page 12, as follows:

> It is clear that the effect of this statutory provision [28 U.S.C. §1447 (previously §71)] is to forbid appellate review of an order remanding a case when the District Court shall decide that the cause was improperly removed! ***But where, as here, it clearly appears that the order was made, not because the Court decided that the cause had been improperly removed, but because of a remittitur entered after it had admittedly required jurisdiction, we do not think that either the word or the spirit of the Statute prevents our directing that it proceed to exercise that jurisdiction by hearing and deciding the case.
>
> ***In none of the cases which we have been able to find has it been held that the effect of the Statute is to deprive the appellate Court of the power to require the Trial Court to hear and decide a case which has been properly removed, and which has been remanded solely on the ground of action taken subsequent to removal which did not affect jurisdiction.
>
> If the provision of Section 28. . . be construed as forbidding review of an Order of Remand in a case such as this, a party in the situation of the

> defendant here will be without remedy. . . . We do not think that it was the intention of Congress that a party entitled to invoke the Federal Jurisdiction should be without remedy if the Court, without a finding expressed or implied of improper removal should remand the case to the State Court on a ground arising after removal and not affecting jurisdiction. Certainly, we do not find in the Statutes any evidence of such intention.
>
> ***Leave will be granted defendant to file a Petition for Writ of Mandamus requiring the Court below to hear and determine the case. It will probably not be necessary for defendant to file such Petition, as the learned Judge may of his own Motion vacate the Order remanding the case and proceed to hear and decide it."

It is, therefore, respectfully submitted that a Writ of Mandamus be issued. *In Re La Providencia Development Corporation,* (First Circuit) 406 F. 2d 251 (1969); *Holub Industries, Inc.* vs. *Wyche,* (Fourth Circuit) 290 F. 2d 852 (1961).

WHEREFORE, Petitioners, Thermtron Products, Inc., (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard, pray that this Court require and compel the Respondent, Hon. H. David Hermansdorfer, to show cause why a Writ of Mandamus should not be issued, commanding said respondent to set aside the void Order of Remand and retain jurisdiction of Civil Action No. 1723 in the

United States District Court for the Eastern District of Kentucky at Pikeville.

WHEREFORE, Petitioners, Thermtron Products, Inc. (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard pray that this Court prohibit and forbid the Respondent, Hon. H. David Hermansdorfer, from entering the void Order of Remand and divesting the United States District Court for the Eastern District of Kentucky at Pikeville, of jurisdiction over the subject matter and parties in Civil Action No. 1723, and further prohibit and forbid the Respondent herein from abdicating the mandatory duties, obligations, and responsibilities as Judge in said action.

Respectfully submitted,

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BY: s/ Frank G. Dickey, Jr.
Attorneys For Petitioners

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RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

Mandamus does not lie to review an order remanding a case to the State Court. 28 U.S.C. 1447(d); *U.S.* v. *Rice,* 327 U.S. 742, 751 (1946); *In Re Pennsylvania Co.,* 137 U.S. 451 (1890). The statutory limitation, "An order remanding . . . is not reviewable on appeal or otherwise . . ." of 28 U.S.C. 1447(d) has been construed by this Circuit to exclude Mandamus. *Stein's Stores* v. *Taylor,* 216 F.2d 439 (6th Cir. 1954).

Although petitioners have expertly set out their contentions, exception is taken specifically to the conclusion respondent had no discretion in the matter. The language of 28 U.S.C. 1447(c) states, in part:

> "(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . ."

The clause "was removed improvidently and without jurisdiction" is a logical non-sequitur if the word "and" is read as a conjunctive. If the court has no jurisdiction, all other considerations are irrelevant.

Only when read as a disjunctive can the word "and" be construed to give meaning to all of the statutory language. The adverb "improvidently" by definition involves a judgment as to the action taken and, at law, the making of such judgments is denominated as judicial discretion. Although petitioners denominate removal as a right[1], it was noted in *Shamrock Oil Corp.* v. *Sheets*, 313 U.S. 100, 106 (1940) by footnote 2 that it was considered a privilege by the House Committee. H.Rept. No. 1078, 49th Cong., 1st Sess., p. 1. The case of *In re La Providencia Development Corporation*, 406 F.2d 251, 252 (1st Cir. 1969) found removal to be a privilege.

In any event, only under the most dire circumstances should discretion be exercised to deny a federal forum on removal be it a limited right or privilege.

It is believed, notwithstanding the construction of 28 U.S.C. 1447(d), that a further statement of the issue should be made.

Disclaimer is made of any intent to reduce the numerical case load of respondent. The intent

1. Where concurrent state and federal jurisdiction exist by Act of Congress, removal as a matter of right exists and discretion does not exist. However, this proceeding does not invoke concurrent jurisdiction but arises under 28 U.S.C. 1332. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 244-245 (1970).

motivating the Show Cause procedure was to afford civil litigants a trial in an appropriate forum. There is no foreseeable trial time available for civil jury cases on the calendars of respondent's several divisions. The decision to remand involved a consideration of the following factors.

At the time the docket analysis was made of the civil cases hopelessly awaiting trial, respondent had concluded the performance analysis for his courts for the calendar year 1973 these figures showed, in summary:

Cases pending 1/1/73	575
Final orders entered during 1973	594
Cases pending 12/31/73	557

The illness of the Chief Judge of the Eastern District of Kentucky necessitated respondent assuming for an indefinite period the criminal side of the London Division which carried, at the time the planning decision was made, in excess of sixty-five (65) criminal matters. Further, among the pending matters for which respondent is chargeable are five (5) protracted cases. Three (3) of these cases had previously been brought to the attention of the Hon. Harry Phillips, Chief Judge, Sixth Circuit Court of Appeals by letter dated January 11, 1974, who promptly brought them to the attention of the Intercircuit Assignment Committee. To date respondent has not been advised of any affirmative action. A

significant planning factor was the projection of Justice Department Attorneys that four thousand (4,000) Black Lung claims arising under Part B of the Coal Mine Health and Safety Act, 30 U.S.C. 901, had been rejected at the administrative level and were expected to be filed in the Eastern District of Kentucky seeking judicial review; and almost four hundred (400) Part A safety violations, civil, were in the United States Attorney's office at Lexington, Kentucky for filing. The Black Lung cases are deemed to be within the priority directive of *Webb* v. *Richardson,* 472 F.2d 529, 538 (6th Cir. 1972). Finally, inquiry established that the Pike County Circuit Court has two (2) excellent judges and no back log in excess of one (1) year.

In this context, a case by case analysis was made of pending civil cases. In the group of removal cases those depending on pure diversity, 28 U.S.C. 1332, were identified and on respondent's own motion orders were entered to show cause why the cases should not be remanded. In all cases where any suggestion of local prejudice or factual cause was made, the cases were retained.

The instant case is a pure diversity case for personal injuries, pain and suffering arising out of an automobile accident. No permanent injury is alleged or is any impairment of the ability to earn money involved. The defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville.

Under any circumstances except the most chronic, the radical procedure invoked in this instance would not have been considered. It is the respondent's belief that a trial judge has an affirmative duty to exercise discretion in the management of dockets in basic fairness to the litigants. There is no doubt merit in defendants' argument of being in federal court as a matter of right, but that does not outweigh the plaintiffs' right to have a reasonably timely trial. The practice in the Eastern District of Kentucky since about 1968 has been for defendants, excluding, of course, petitioners in this matter, to remove cases from State Court in the perfect assurance that no trial time would be available in the foreseeable future. There is no residual fairness in this practice. Accordingly, and with cases of superior priority pending, respondent has undertaken since January 1974 to give relief to the civil docket. The consequence predictably has been an accumulation of criminal matters which no longer may be deferred. At this writing respondent has pending one hundred and forty four (144) criminal cases which have been culled for pleas. Considering that the Eastern District of Kentucky has the sixth highest weighted filing per judge in the United States in Criminal cases, the conclusion is made that for the foreseeable future measured in years, not months, there will be no available jury trial time for non-priority civil cases.

Respondent respectfully declines to request any specific relief under the circumstances.

This the 18 day of April, 1974.

s/ H. David Hermansdorfer
H. David Hermansdorfer
United States District Judge
Eastern District of Kentucky

Respondent

(Certificate Omitted in Printing)

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(Title Omitted in Printing)

MEMORANDUM OF SUPPLEMENTAL AUTHORITIES

MAY IT PLEASE THE COURT:

Come the Petitioners, Thermtron Products, Inc. (erroneously sued as Therntron Products, Inc.) and Larry Dean Newhard, by counsel, and for Memorandum of Supplemental Authorities, in support of the Petition for Writ of Mandamus and/or Petition for Writ of Prohibition, and state as follows:

This Court stated in *Direct Transit Lines* vs. *Local Union, No. 406* (6th Cir. 1952) 199 F. 2d 89 that a cause, removed to District Court, should not be remanded if it were properly removable upon the record as it stood at the time of the filing of the petition for removal. In the within action, the Respondent conceded that this action was properly removed. Therefore, the Order of Remand was improper and void. Although the *Direct Transit Lines* case, was distinguished in *Hat Corp. of America* vs. *United Hatters, etc.* (D. C. Conn.) (114 F. Supp. 890 (1953)), upon the grounds that the Court's attention was principally focused on the propriety of remedy by mandamus, the proposition that a case should not be remanded if properly removed still stands.

Respondent's Order of Remand was based primarily upon the discretionary consideration of

balancing the statutory rights of the Petitioners herein to remove the case from the Pike Circuit Court against the equitable consideration of affording the Plaintiffs an early trial date. This consideration does not constitute grounds for remand of a case properly removed by the Petitioners.

There is no discretionary power to remand a case to State Court. In *Vann* vs. *Jackson,* (E. D. N. Car.) (165 F. Supp. (1958)), the Court stated as follows, at pages 380-381:

> "[T]he proposition has been advanced that the Court has discretionary power to remand this case to the state Court, eventhough properly removed to the federal court. In considering this question, the Court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of Justice to exercise such discretion.
>
> * * * since there is no means for reviewing an Order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (citation omitted) The Court is without power to remand if no discretionary power exists.
>
> * * * It is concluded that where Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state Court to be removed to the federal Court, *no discretionary power exists to remand the case to the state Court.*" (emphasis added)

In *Davis* vs. *Joyner,* (E. D. N. Car.) (240 F. Supp. 689 (1964)), the identical question presented in the case of *Vann* vs. *Jackson, supra,* and *Larkin* vs. *Roseberry,* (E. D. Ky.) (54 F. Supp. 373 (1944)), was brought before the District Court. The Court, stated, at page 691, that the Court's authority to remand is found in Title 28 U. S. C. §1447 (c) and provides that the District Court shall remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case in that instance, and it is certainly not the case, in the within action. In *Davis* vs. *Joyner, supra,* the Court held that no discretionary power exists to remand the case to the state Court.

Although the Respondent takes exception, from a semantic stand point, to this principle, it is clear that the respondent had no discretion to remand this case. Were it otherwise, 28 U. S. C. §1441 et. seq. would be rendered ineffective. Also, the same would constitute repeal of the Statute by implication, which is not favored. *Larkin* vs. *Roseberry,* (E.D. Ky., 54 F. Supp. 373 (1944)). Furthermore, the Respondent had no discretion to remand the instant case to afford the plaintiffs an earlier trial date. In *Romero* vs. *ITE Imperial Corporations,* (D. C. Puerto Rico) (332 F. Supp. 523 (1971)), and action was originally brought by the plaintiff in the Superior Court of Puerto Rico. A timely petition for removal was filed on January 19, 1971. The varified petition for removal alleged that the basis of the petition was the existence of

total diversity between the properly named parties. On July 7, 1971, the plaintiff filed a Motion to Remand. One of the primary issues was "whether the case should be remanded." The Court stated, at page 526, as follows:

> "The right to remove an action from a state court to the federal district court is a *statutory* right and it is a right that has existed since the original Judiciary Act of 1789. (citations omitted). The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants. (citation omitted)
>
> *Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct * * * once the statutory requirements for the right of removal have been met, this Court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff."* [*emphasis added*].

It is, therefore, submitted that the Petitioners had a statutory right to remove the within action. Furthermore, it is apparent that there was not discretion afforded the Respondent to order a remand, particularly upon the grounds stated.

The right of removal is a valuable right. *Muller* vs. *Lyke Coastwise Line,* (S. D. Texas) (144 F. Supp. 135 (1940)). "While the plaintiffs had a right to choose initially the state Court as the forum for this action, the defendants have a subsequent equal right to resort herein to the Federal Court by compliance with the removal statute, transferring indirectly original jurisdiction from the state to the Federal Court." (*Garland* vs. *Humble Oil & Refining Company,* E. D. Tenn.) 306 F. Supp. 608, 610 (1969). In *Gentle* vs. *Lamb-Weston, Inc.* (N. D. Main) 302 F. Supp. 161 (1969), the Court stated, at page 165, as follows:

> "While the plaintiff, in good faith, may proceed in the State Courts . . . *it is equally true that the Federal courts should not . . . prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts in proper cases, to retain their own jurisdiction.*" (emphasis added)

The statutory right of removal may be protected by issuance of the Writ sought by the Petitioners.

It has been stated by the Respondent that "In all cases where any suggestion of local prejudice of factual cause was made, the cases were retained, and that the defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville." The Petitioners in objecting to

remanding the within action stated that "These defendants would not have removed this case to the United States District Court if these defendants thought or had reason to believe that they could receive a fair and impartial trial in the Pike Circuit Court." (Exhibit "H"). It has further been stated, by the Respondent, that "No permanent injury is alleged" by the plaintiffs, however, in Exhibit "A", both plaintiffs made allegations with regard to "permanent injuries." In this light, to single out cases for remand constitutes a denial of the statutory rights of the Petitioners. As stated in *Central of Georgia Railway Co.* vs. *Riegel Textile Corp.* (5th Cir. 1970) 426 F. 2d 935, 938:

> "There is a federal interest in seeing that the removal statute is applied uniformly to litigants in all states. As the Supreme Court said in *Shamrock Oil & Gas Corp.* vs. *Sheets*,
>
> > The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. (citation omitted)"

It is, therefore, submitted that where the Petitioners properly removed this action from the Pike Circuit Court, in accord with the statutory right afforded, there is no discretionary power to remand the instant case to the State Court. The valuable

right of the Petitioners must be protected by requiring the Respondent herein to retain and exercise jurisdiction, in entertaining the suit, considering the merits and rendering a binding decision thereon. *Food Basket* vs. *Amalgamated Meat Cutters, etc.* (W. D. Ky) 124 F. Supp. 463, 465 (1954) and *In re President and Fellows of Harvard College,* (First Cir. 1945) 149 F. 2d 69.

In conclusion, it should be stated that the Petitioners truly regret the existence of the current situation in the United States District Court for the Eastern District of Kentucky, at Pikeville. It should further be stated that these circumstances certainly cannot be deemed to reflect, in any regard, whatsoever, upon the abilities and performance of the Respondent herein, who has performed under extremely difficult circumstances, most ably and to his very best, during his tenure on the bench. Nevertheless, there are no grounds for abrogating the rights of the Petitioners and denying them jurisdiction of the United States District Court.

Respectfully submitted,

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* * * * * * *

FILED: Jun 4, 1974

No. 74-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THERMTRON PRODUCTS, INC.
and
LARRY DEAN NEWHARD, Petitioners

vs

HONORABLE H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, Respondent

ORDER

See Petition For Writ of Certiorari, Appendix, p. 1a

* * * * * * * *